TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 217.

FLORENCE AUDUBON AND JOHN W. HULSE, ASSIGNEE OF W. H. SMITH, APPELLANTS,

vs.

ROBERT W. SHUFELDT.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MARCH 3, 1900.

(17,661.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 17, 1900.

a Supreme Court of the District of Columbia.

In the Matter of ROBERT W. SHUFELDT, Bankrupt. No. 34. In Bankruptcy.

UNITED STATES OF AMERICA, *District of Columbia*, } ss:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 Original.

Debtor's Petition.

Filed Apr. 5, 1899.

In the Supreme Court of the District of Columbia, Holding a Court in Bankruptcy.

The petition of Robert W. Shufeldt, of Washington, District of Columbia, a physician, respectfully represents:
(State occupation.)
That he has had his principal place of business at 2508 University
(or has resided, or has had his domicil.)
place for the greater portion of six months next immediately preceding the filing of this petition at No. 2508 University place, within said judicial district; that he owes debts, which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked "A," and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked "B," and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts.

2 Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

ROBERT W. SHUFELDT, *Petitioner.*

DEWEES & DEWEES, *Attorney.*

UNITED STATES OF AMERICA, }
District of Columbia, } ss:

I, Robert W. Shufeldt, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

R. W. SHUFELDT, *Petitioner.*

Subscribed and sworn to before me this 5th day of April, A. D. 1899, at 10.12 a. m.

J. R. YOUNG, *Clk.*
By R. J. MEIGS, JR., *Ass't Clk.*

(Endorsed:) Docket No. 34. In the matter of Robert W. Shufeldt, bankrupt. Filed 10.12 o'clock a. m. this 5th day of April, 1899. J. R. Young, clerk, by R. J. Meigs, Jr., ass't cl'k.

3 *Adjudication of Bankruptcy.*

Filed Apr. 5, 1899.

In the District Court of the United States for the Supreme Court, District of Columbia.

In the Matter of ROBERT W. SHUFELDT, Bankrupt. No. 34. In Bankruptcy.

At Washington city, in said District, on the 5th day of April, A. D. 1899, before the Honorable W. S. Cox, judge of said court in bankruptcy, the petition of Robert W. Shufeldt that he, Robert W. Shufeldt, be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Robert W. Shufeldt is hereby declared and adjudged a bankrupt accordingly.

W. S. COX, *J.*

Order of Reference.

Filed Apr. 5, 1899.

In the District Court of the United States for the — District of —.

In the Matter of ROBERT W. SHUFELDT, Bankrupt. No. 34. In Bankruptcy.

It is ordered that said matter be referred to Edward S. Mc-
4 Calmont, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts, and that the said Robert W. Shufeldt shall attend before said referee on the 15th day of April, 1899, at Washington, D. C., and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said bankruptcy.

W. S. COX, *J.*

Petition for Discharge.

Filed Aug. 8, 1899.

In the Supreme Court of the District of Columbia as a Court of Bankruptcy.

In the Matter of ROBERT W. SHUFELDT, Bankrupt. No. 34, Docket No. —.

To the Honorable Charles C. Cole, a justice holding said court:

—— ——, of the District of Columbia, respectfully represents that on the 8th day of August, 1899, he was duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from said discharge.

Dated this 8th day of August, A. D. 1899.

R. W. SHUFELDT, *Bankrupt.*

5 Filed Aug. 8, 1899.

No. 34. Bankruptcy.

In the Supreme Court of the District of Columbia as a Court of Bankruptcy.

In the Matter of ROBERT W. SHUFELDT, a Bankrupt.

It appearing to the court that by inadvertency the notice of the time and place of the hearing on the petition for the discharge filed herein, as required by the order of this honorable court passed on the 2d day of August, A. D. 1899, has not been published or mailed to the debtors of said bankrupt, and that there is not now time sufficient before the day fixed for said hearing for the publication and mailing of said notices as required by law, it is, on motion of the attorneys of said bankrupt, on this the 8th day of August, A. D. 1899, ordered that the time fixed by said order for said hearing is hereby altered to the 21st day of August, A. D. 1899, at ten o'clock of the forenoon of said day, before this honorable court, and that the referee, besides causing publication thereof to be made in accordance to and with said former order, shall send by mail to all known creditors notice of the filing of said petition of discharge and of the time and place fixed for a hearing thereon, addressed to them at their places of residence, as stated.

HARRY M. CLABAUGH, *Justice.*

Test: —— ——, *Clerk.*

DEWEES & DEWEES,
Solicitors Pet.

6 *Objections to Discharge.*

Filed Aug. 25, 1899.

In the District Court of the United States for the District of Columbia.

In the Matter of ROBERT W. SHUFELDT, Bankrupt. In Bankruptcy. No. 34.

John W. Hulse, of the District of Columbia, assignee of scheduled creditor, W. H. Smith, a party interested in the estate of said Robert W. Shufeldt, bankrupt, by Webb and Webb, his attorneys, does hereby oppose the granting to him of a discharge from his debts, and for grounds of such opposition does file the following specifications:

1. Because said action of the said Shufeldt is fraudulent and not within the intention of the bankruptcy act of 1898.

2. Because said bankrupt is concealing assets.

3. Because the amount of the debts said bankrupt is attempting to be discharged from is less than one thousand dollars ($1,000).

WEBB & WEBB,
Attorneys for Hulse.

7 *Findings of Facts.*

Filed Jan. 9, 1900.

Robert Wilson Shufeldt on April 5th, 1899, filed a petition in bankruptcy, alleging that he was indebted to the amount of $4,538.33, and that he had no assets which were not exempt under the law.

The debts he sought release from were the following:

Secured Debts.

Washington National Building and Loan Association...	$3,200.00

Unsecured Debts.

Florence Audubon	$800.00	
Wm. H. Smith, taking testimony	150.00	
Lewis J. Yeager, attorney's fee	150.00	
Parker, Bridget & Co., clothes	18.00	
Saks & Co., clothes	74.00	
W. B. Moses & Son, furniture	20.00	
W. J. Zeh, coal	23.00	
Waters & Son	57.03	
William Walker	28.30	
G. A. Gude, meat	18.00	
		1,338.33
Total		$4,538.33

It appeared from the evidence taken in this case that the said Robert W. Shufeldt was a surgeon with the rank of captain in the United States Army, on the retired list, and had been such for several years prior to the filing of this petition, and that he was in receipt of a salary of $175.00 per month, his pay as such retired officer.

That the debt of $3,200.00 was the debt of himself and wife secured on property situated in Takoma Park, in Montgomery county, State of Maryland, and conveyed to said wife by him in March, 1898, without consideration.

That the debt of $800.00 represented arrears of alimony granted to his former wife, the appellant Florence Audubon, under a decree of the circuit court of Montgomery county, Maryland, passed on the 25th day of February, 1898, directing said Shufeldt to pay alimony to her at the rate of $50.00 per month, beginning April 1st, 1898. No part of said alimony has been paid.

That said Shufeldt left Montgomery county on or about March 1st, 1898, and took up his residence in the city of Washington, District of Columbia.

That a suit in equity has been instituted in the supreme court of the District of Columbia to enforce the decree of the said circuit court for Montgomery county and make said Shufeldt pay the said alimony in arrears, which suit is still pending.

That the debt of $150 to William H. Smith was a promissory note given for taking testimony in the divorce suit (case), above referred to, under a commission from said circuit court for Montgomery county, and that said note had been duly assigned to J. W. Hulse prior to the filing of this petition in bankruptcy.

That the debt of $150 to L. J. Yaeger was for professional services rendered in the District of Columbia in the equity suit aforesaid.

That the rest of said debts were contracted for supplies furnished him and his family prior to the filing of the said petition in bankruptcy. It further appears that after Robert W. Shufeldt filed his application in bankruptcy in this court the complainant filed herein her claim for the said $800, being the arrears of alimony claimed to be then due by him under the decree of the circuit court of Montgomery county, describing it as "a debt" due by him to her. The claim was voted at the meeting of creditors for the election of a trustee.

Subsequently a memorandum was filed in behalf of Mrs. Audubon directing the withdrawal of her said claim, but no order of the court to that effect was passed.

A motion was then made in this court to refuse Shufeldt final discharge, because if the $800 claim is to be considered as withdrawn, the amount of the unsecured debts returned in the schedules ($1,338.32) would be reduced below $1,000, which, it is averred, was insufficient to give this court jurisdiction to award his discharge; but sec. 4 (*b*) referred to has no application except to the cases of *involuntary bankrupts*, while the present case is one of a *voluntary* application.

The further point is made that the claim for alimony was not a

provable debt under the bankrupt act, and that it should be excepted especially from the list of debts, for which a discharge might be given, and otherwise that no discharge should be granted.

This point was fully argued and considered by the court, and all authorities accessible and text books have been examined upon the subject.

Conclusions of Law.

It is undoubtedly true that the decree awarding alimony does not *create an ordinary debt* in the sense of a judgment or decree enforcing a civil contract.

The husband upon marriage became charged with a *duty* of the highest character arising out of the *marital relation itself*, which was enforce-able during marriage. The propriety of compelling its enforcement is based upon the highest public considerations, as well as upon the needs of the wife.

After a divorce, where no blame is chargeable against the wife, the duty remains, and the obligation to the wife personally as well as to the public is greatly strengthened, since such support may be the only barrier between the wife and starvation or misconduct.

But high as this duty is and severe as may be the methods by which it is enforced, those methods have their limitations, which do not apply to the collection of a common money obligation. Ordinarily a decree or judgment is collectible within the period *fixed by the statute of limitations.*

But the courts of equity refuse to compel payment of arrears of alimony *beyond a year* previous to the application unless a satisfactory explanation appears.

2 Bish., Marr. & Div., par. 1098.

The reasons for this innovation upon the statutes of limitations are that the allowance is given originally for the support of the wife *from year to year*, and if she has kept silent during a year the court would rather assume a condonation on her part or that she had managed to obtain a support during that period than her imprisoning the father of her children for these long-continuing arrears without the husband having had an opportuity or complaint presented by her to show such a condition of his faculties as would have induced the court to reduce the allowance if the complaint had been made or suspend its collection entirely for a certain time.

Again, although no court can reduce or enlarge an ordinary decree or judgment by a dollar, yet the equity judge may modify the order for alimony in either direction or revoke it altogether.

The conduct or the laches of either party may justly, I think, as well be considered when the wife's application takes the form of resisting the discharge of her husband as a bankrupt as in any other of the particulars referred to.

The decisions upon the questions are conflicting, but I am well satisfied that the ruling of Judge Evans reported in 94 Federal Reporter of May 13, 1899, *In re* Houston, in the district court of Kentucky, is correct, that a judgment in a divorce proceeding requiring

the defendant to pay alimony in instalments is a provable debt against the defendant's estate in bankruptcy as to all instalments that have accrued up to the date of the adjudication, and will
11 be released by the discharge of the bankrupt.

The more recent decisions upon the point are in accord with this ruling. The most recent I have seen is that of Kohlsaat, J., in the U. S. district court, northern district of Illinois, in the matter of Challoner, reported in the National Bankruptcy Laws and Reports of 1 January, 1900, p. 105.

Without going further into the question, I shall overrule the objection to the petitioner's discharge and pass an order granting his final discharge.

My opinion is that the arrears of alimony *which had accrued against the* bankrupt up to the time *of the adjudication* do constitute a provable debt in the sense of the act of 1898, but that the discharge cannot affect any instalments accruing subsequent to the adjudication.

A. B. HAGNER, *Justice.*

12 *Discharge.*

Filed Jan. 9, 1900.

In the Supreme Court of the District of Columbia as a Court of Bankruptcy.

In the Matter of ROBERT W. SHUFELDT, Bankrupt. No. 34, Doc. —.

Whereas Robert W. Shufeldt, of the District of Columbia, has been duly adjudged a bankrupt under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore, this 9th day of January, A. D. 1900, ordered that said Robert W. Shufeldt be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 5th day of April, A. D. 1899, on which day the petition for adjudication was filed by (against) him, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

A. B. HAGNER, *Justice.*

Attest:

—— ——, *Clerk,*

By —— ——, *Assistant Clerk.*

Duplicate.

13 *Order Allowing Appeal.*

Filed Feb. 8, 1900.

In the District Court of the United States for the District of Columbia.

In the Matter of ROBERT W. SHUFELDT, Bankrupt. In Bankruptcy. No. 34.

On motion of Webb and Webb, attorneys for the creditors, Florence Audubon and John W. Hulse, assignee of W. H. Smith, in the above-entitled cause, it is by the court this 8th day of February, A. D. 1900, ordered that said creditors be allowed to appeal to the Supreme Court of the United States on giving bond in the sum of five hundred dollars ($500), conditioned for the payment of all costs.

A. B. HAGNER, *Justice.*

14 *Appeal Bond.*

Filed Feb. 8, 1900.

In the District Court of the United States for the District of Columbia.

In the Matter of ROBERT W. SHUFELDT, Bankrupt. In Bankruptcy. No. 34.

Know all men by these presents that we, Florence Audubon and John W. Hulse, as principals, and Lisle S. Lipscomb, as surety, are held and firmly bound unto Robert W. Shufeldt, his heirs, executors, or assigns, in the full and just sum of five hundred dollars ($500), to be paid to the said Robert W. Shufeldt, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of January, one thousand nine hundred.

Whereas the above Florence Audubon and John W. Hulse have noted an appeal to the Supreme Court of the United States to reverse the decision rendered in the above-entitled suit, and a citation directed to said Robert W. Shufeldt, citing and admonishing him to be and appear in the Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof:

Now, therefore, the condition of this obligation is such that if the said Florence Audubon and John W. Hulse shall prosecute
15 their said appeal to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation

shall be void; otherwise the same shall remain in full force and virtue.

FLORENCE AUDUBON. [SEAL.]
JOHN W. HULSE. [SEAL.]
LISLE S. LIPSCOMB. [SEAL.]

Witnesses:
W. H. SHELDON.

As to Hulse and Lipscomb:
CHARLES H. PARKMAN.

Approved Feb'y 8th. 1900.
A. B. HAGNER, *Justice.*

16 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } ss:

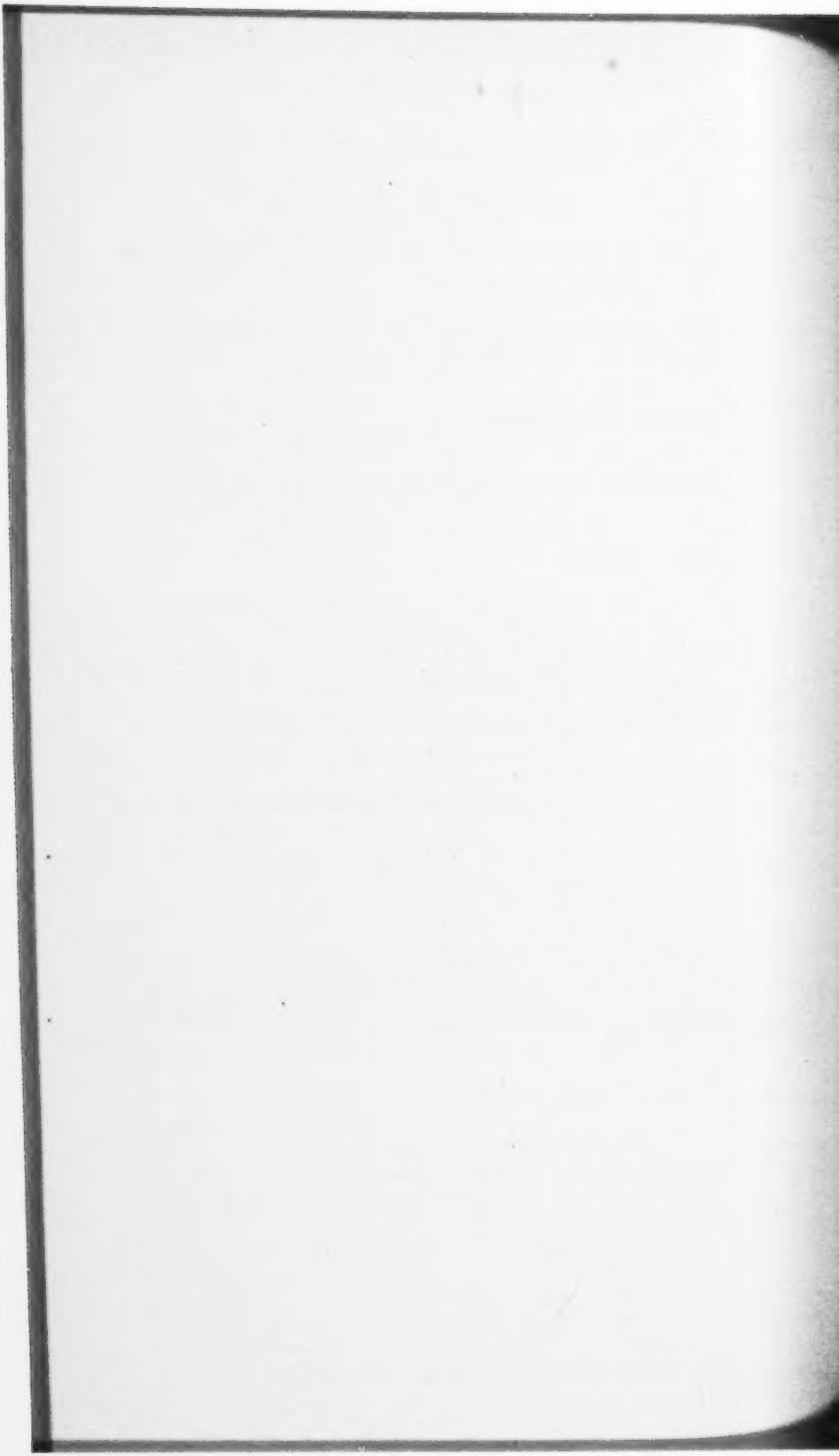
I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 15, inclusive, contain a true and correct transcript of the record and proceedings had in said court, as provided in sec. 3, rule 36, of the general orders in bankruptcy adopted and established by the Supreme Court of the United States, in cause No. 34, bankruptcy, in the matter of Robert W. Shufeldt, bankrupt, as the same remain upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 1st day of March, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: File No., 17,661. District of Columbia supreme court. Term No., 217. Florence Audubon and John W. Hulse, assignee of W. H. Smith, appellants, *vs.* Robert W. Shufeldt. Filed March 3d, 1900.



Office Supreme Court U.S.
FILED
MAR 11 1901
JAMES H. McKENNEY,
Clerk

No. 217.

Brf. of Webb for Appellants.

Filed Mar. 11, 1901.

In the Supreme Court of the United States.

No. 217.

FLORENCE AUDUBON AND JOHN W. HULSE, ASSIGNEE,

vs.

ROBERT W. SHUFELDT.

BRIEF FOR APPELLANTS.

HENRY RANDALL WEBB,
Counsel for Appellants.

In the Supreme Court of the United States.

No. 217.

FLORENCE AUDUBON AND JOHN W. HULSE,
ASSIGNEE,

vs.

ROBERT W. SHUFELDT.

This is appeal from a decision of the District Court of the United States for the District of Columbia, adjudicating Captain Robert W. Shufeldt, a surgeon in the U. S. Army on the retired list, a bankrupt and discharging him from the payment of his debts.

The grounds for this appeal are:

FIRST.

That the appellee is not and never has been a bankrupt and is not entitled to claim the benefit of the General Bankruptcy Act of July 1, 1898; and that the attempt on his part to be discharged from the payment of his debts constitutes a fraud upon his creditors.

The term bankrupt is applied to a man, who has failed in business, or who, through some misfortune, has suffered great pecuniary loss, and in consequence thereof become unable to pay his debts. The law considers it more just to release and discharge this man from the payment of his debts than let him lead the balance of his life, weighed down and harrassed with debts which he never can pay.

> "The two chief objects or general purposes of a bankrupt law are the relief of unfortunate persons,

> who by losses in business have become insolvent and unable to pay their debts in full, and the equitable distribution among creditors of whatever property such persons may still have. It is chiefly the relief of business men, *as business men*, and indirectly for the public good, and rehabilitating them to a condition in which, as active business men, they may take their proper share in the productive and industrial class of the community."
>
> In re Lachmeyer, Fed. Cas. 7966.

But with the appellee, Captain Shufeldt, none of these facts exist. He has never failed in business or met with great financial loss. He has received a regular salary from the United States Government, and his ability to pay his debts upon the day when he filed his petition in bankruptcy, was the same as when he contracted them.

> " A bankrupt is a person unable to pay his debts."
>
> Kuntzler *vs.* Kohaus, 5 Hill, 319.

This is not the case with Captain Shufeldt. His salary is now and has been for many years One hundred and seventy-five dollars ($175) per month, his pay as a retired officer of the army. This salary has always been promptly paid and he has only to live and behave himself to receive it, while he can devote his entire time toward the increase of his income. With reasonable effort and economy he could easily have paid his debts, had he chosen so to do.

Again, Captain Shufeldt gives up nothing, because he maintains that his only possessions, consisting of household furniture, are exempt; and that his salary can not be attached by his creditors.

Thus he claims the right to receive from the United States Government the sum of $2,100 per year (an income equal to 6 per cent. on $35,000, or 5 per cent. on $42,000) his pay as a retired army officer, while at the same time, he calls himself a bankrupt, and claims the privilege of being discharged from the payment of his debts.

It is reasonable to suppose that the Bankruptcy Act of July 1, 1898, was never intended to apply to a case like this, and that its makers never contemplated allowing a man in receipt of a handsome salary, to obtain the benefit of its provisions, and at the same time to reserve to himself the full benefit of that salary.

If such be the law, then this act is not only a travesty on justice and honesty, but an encouragement to fraud and a boon to the swindler and the cheat.

While it is true that his salary can not be attached by legal process, still he should not be allowed to receive the benefits of the Bankruptcy Act and be discharged from the payment of his debts, and at the same time be allowed to receive and reserve to himself his salary, as an officer of the U. S. Army.

If the law grants him this privilege, it does an act of great injustice to the creditors of this officer, because it deprives them of the only means they have of making him pay his debts.

Officers of the army can be tried by court martial if they do not pay their debts upon the complaint of their creditors. This is a means not infrequently resorted to in such cases. But in this case the court, by discharging Captain Shufeldt from the payment of his debts, has deprived his creditors of this, their only remedy.

Captain Shufeldt was tried by court martial for the non-payment of his debts; he pleaded his discharge in bankruptcy and was acquitted for that reason.

General Merritt, who disapproved the findings of this court martial, said:

> "The Government does not give officers respectability of rank and the benefit of retired pay to enable them to take advantage of the bankruptcy act, in order to rid themselves of indebtedness incurred through their own fault and in purely domestic and private matters, disconnected with any business venture."

An examination of Shufeldt's indebtedness (Rec. p. 4), exclusive of the debt of $3,200 secured upon his real property in Maryland, will show it to be of two kinds: First, the indebtedness incurred on account of the divorce, which his former wife obtained from him on account of his adultery, *i. e.*, $650 (wrongfully set down as $800) arrears of alimony; $150, note, given for taking testimony in that case; and $150, his attorney's fee for service, rendered in connection with said case; in all, $950.

Second. The sum of $238.33 for food, clothing, etc., furnished himself and wife shortly before he filed his petition in bankruptcy.

It is evident, therefore, that none of the debts, from which Captain Shufeldt seeks discharge, were contracted in any business venture or enterprise; but as General Merritt says, they are purely private and domestic matters.

He is not a bankrupt; but he seeks, through the technicalities of the Bankruptcy Act, to be released and relieved from a duty, imposed upon him by a decree of the Circuit Court for Montgomery County, on account of his infidelity to his wife, and the obligations incurred by him in resisting said decree; and incidentally to be discharged from the payment of debts, contracted for food and clothing furnished him upon his credit as an officer of the United States Army.

If such discharge can be obtained once, there is nothing to prevent its being obtained as often as the so-called bankrupt may desire it. The disgraceful spectacle may then be seen of army officers and other Government employees repeatedly seeking and obtaining, at little or no loss or inconvenience to themselves, discharges from the payment of their debts, under the provisions of the Bankrupt Act of July 1, 1898, while they retain the full benefit of the salaries paid them by the U. S. Government, upon the credit of

which they have been able to contract the debts from which they seek discharge.

Captain Shufeldt's salary is not exempted from attachment under the provisions of section 797, R. S. D. C.; nor under the amendment thereto made June 19, 1878.

20 Stat. at Large, 173.

See Chapter 321, Richardson's Supplement (2d edition), 196.

Captain Shufeldt is a retired officer of the Army, and is performing and has for several years performed no duty for the Government; and draws his pay as a reward for services entirely passed, in order to enable him to live in a manner becoming his rank. His pay is therefore rather in the nature of an annuity than a salary for which service has to be rendered.

If this annuity came from a private source it would be liable to attachment by his creditors.

Degraw *vs.* Clason, 11 Paige, 136.

It is respectfully submitted that Captain Shufeldt is not and never has been a bankrupt; and should not be allowed to occupy the exceedingly anomalous position of being adjudged a bankrupt and discharged from the payment of his debts, while by reason of the annuity given him by the United States Government, he is in possession of ample means to pay them.

SECOND.

That alimony in arrear is not a provable debt in bankruptcy and can not be affected by the discharge of the bankrupt.

In this case the alimony was given by a Maryland court in a decree of divorce granted on account of the adultery of the petitioner in bankruptcy.

The weight of the decisions prior to the passage of the present bankruptcy law was in favor of the appellant's contention and against the decision of the lower court.

> "A decree for alimony has been held to be not a judgment for enforcement of a contract but for the enforcement of a duty in the performance of which the public as well as the parties are interested."
>
> Andrew *vs.* Andrew, 62 Vt. 495.
> Noyes *vs.* Hubbard, 15 L. R. A. 394.
> Romaine *vs.* Chauncey, 14 L. R. A. 714.
> Linton *vs.* Linton, 15 Q. B. Div. 239.

> "The husband is bound to support the wife, yet this duty is an imperfect obligation, which is not technically a debt. He does not owe her any specific amount of money but he owes a duty to her, which may be enforced by the order of the court, compelling him to pay her alimony."
>
> Ex parte Perkins, 18 Cal. 180.
> Tolman *vs.* Leonard, 6 App. D. C. 233.

Several decisions have been made since the passage of the present Bankruptcy Act, both for and against the appellant's contention that arrears of alimony do not constitute a provable debt, which can be discharged in bankruptcy.

Those in favor of appellant's contention are:

In re Anderson, 97 Fed. Rep. 321.
In re Shepherd, 97 Fed. Rep. 187.
In re Emil Smith, 3 Am. B. R. 68.
In re Nowell, 3 Am. B. R. 837.

Those against appellant's contention are:

In re Houston, 94 Fed. Rep. 119.
2 Am. B. R. 107.
In re Van Orden, 96 Fed. Rep. 86.
2 Am. B. R. 801.
In re Challoner, 98 Fed. Rep. 82.
3 Am. B. R. 442.

The error in the decisions against the appellants' contention is that they fail to distinguish the fundamental difference between a decree in equity and a judgment at law, and treat both as the same in effect, and as being a mere liability to pay a debt, provable in bankruptcy under the provisions of section 63 a (1) of the act.

This error is clearly pointed out by Referee Hotchkiss in In re Emil Smith, 3 Am. B. R. 77, who very appropriately concludes his remarks by saying:

> "Alimony is no longer, if it ever was, a mere liability to pay in the sense of Sec. 63 a (1) it is a liability to do, reduced to be sure, to dollars and cents, but only because of the practical impossibility of enforcement otherwise."

The decisions in the cases, In re Houston and In re Van Orden are inapplicable to the case at bar, as clearly appears from the opinion of Lowell J., in the case of In re Nowell, 3 Am. B. R. 840, 841.

It is best, therefore, not to pay too much attention to the formula—the dress—the garb, which a decree or judgment wears, when it comes for justice, but to look rather to the nature of the liability and the original cause of action.

See In re Cotton, Fed Cas. 3269.

Looking at the nature of the liability in the case at bar we may well conclude that:

> "Permanent alimony is regarded rather as a portion of the husband's estate, to which the wife is equitably entitled, than a debt."

In re Lachmeyer, Fed Cas. 7966.
In re Garrett, 2 Hughes, 235.
Fed Cas., 5252.
Barclay *vs.* Barclay, 56 N. E. 822.

But the principal reason why alimony should not be considered a debt provable in bankruptcy, is that it is always

subject to modification by the court which grants it, and can be increased or diminished, if the occasion demands, at the request of either party. This is its chief characteristic, and in this respect it differs materially from a judgment at law and from almost every other decree in equity.

It can not therefore be said to constitute, in any sense, a fixed liability.

> "The allowance of alimony is not in the nature of an absolute debt. It is not unconditional and unchangeable. It may be changed in amount, even when in arrears, upon good cause shown to the court having jurisdiction."
>
> Tolman *vs.* Leonard, 6 App. D. C. 233.
> In re Lachmeyer, Fed. Cas. 7966:
> Mulock *vs.* Mulock, 18 N. J. Law, 188.
> Alexander *vs.* Alexander, 13 App. D. C. 334.
> Andrew *vs.* Andrew, 62 Vt. 495.

If the appellee had been really a bankrupt, and if he had had any claim to be considered one, he could easily have applied to the Maryland court and, upon a proper showing, had the alimony reduced or discharged *in toto*.

But knowing that he was able to pay this alimony, had he chosen so to do, and that his contention was a fraudulent one, he was afraid to apply to the Maryland court, but sought refuge in the technicalities of the Bankruptcy Act.

This action is utterly without merit, and should receive nothing but condemnation from every respectable person.

In the case of Linton *vs.* Linton, 15 Q. B. Div. 244, where the bankruptcy was self-imposed and apparently for the sole purpose of cutting off alimony, as in the case at bar, Brett, the Master of Rolls, in referring to this attempt to cut off alimony, said: "Anything more disgraceful, in a moral point of view, can not be imagined."

Alimony has also been said to be something higher than a mere liability to pay; it is an obligation to support, which, taken at marriage and continuing through life, has been

measured up and temporarily determined by a court, but which is absolutely inalienable and undischargeable, and, save in amount, beyond the control of the courts, except with the consent or on the fault of the wife.

Haight, J., in Wetmore *vs.* Wetmore, 149 N. Y. 520, said: "Equity will not feed the husband and starve the wife."

But in the case at bar it would seem that this very thing has been attempted; the husband, while having ample means, is freed from liability for the support of his wronged and injured wife, and she must take care of herself or be supported by friends. This is indeed a travesty on all the principles of equity and justice.

It is therefore respectfully submitted that the rulings of the court below should be overruled, and the appellee declared not to be entitled to the benefits of the Bankruptcy Act.

But if, under the provisions of the present Bankruptcy Act, he can be declared a bankrupt, it is further submitted that he should not thereby be released from the payment of the arrears of alimony, and that the woman he has wronged should not be deprived of that portion of his income, which the Maryland court had decided in equity and justice she is entitled to receive.

HENRY RANDALL WEBB,
Counsel for Appellants.

No. 217.

Br. of Dawson for Appellee

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Supreme Court of the United States.

No. 217.

FLORENCE AUDUBON and JOHN W. HULSE, Appellees,

vs.

ROBERT W. SHUFELDT.

BRIEF FOR APPELLEE.

JOHN T. DAWSON,
Counsel for Appellee.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-2-01

Supreme Court of the United States

No. 217.

FLORENCE AUDUBON AND JOHN W. HULSE, ASSIGNEE,

vs.

ROBERT W. SHUFELDT.

The first question to be disposed of in this case is whether the appellee was a bankrupt at the time he was adjudged a bankrupt, and the law of 1898 is the one to decide this question.

This law defines who may become bankrupts in section 4 *a*, where it is stated that—

"Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt."

To this clause of the bankruptcy law there are no exceptions whatever, save the one set forth in it, namely, a corporation. Therefore on the day the defendant, the appellee, filed his petition as a voluntary bankrupt under this act, and was adjudged a bankrupt, he was, as a citizen of the United States, as much entitled to the benefits of this act as though he was in no way connected with the army.

Apart from the simple assertion of the counsel for the appellant, this court has no actual knowledge of his, the appellee's, connection with the Army of the United States, and even had the court that knowledge there can be nothing in this contention, inasmuch as the defendant is a retired surgeon of the army, that that fact debars him from being entitled to the benefits of the bankruptcy act, for it is clear from the wording of section 4 *a* that the defendant is just as much entitled to the same as though he had never entered the army, there being no exception or limitation as to who are entitled to the benefits of this act. We therefore, without further remark, dismiss this and pass to the question whether alimony is a provable debt or not under the present bankruptcy law. By referring to section 17 of that law we find that there are but four (4) exceptions to provable debts, and the court will readily see that alimony is not one of these four exceptions to what the law considers to be provable debts, and that this has been the interpretation of the law is clear from the rulings of the United States courts on this subject, as an examination of the following cases, here cited and thus far reported, will show:

In re Houston, 94 Fed. Rep., 119.
In re Van Orden, 96 Fed. Rep., 86.
In re Challoner, 98 Fed. Rep., 82.

These are all cases directly in point, and all hold that alimony is a provable debt. Moreover, had any doubt existed as to what the intent of Congress on this subject was, the matter of alimony would have been placed among the claims excepted by this act of Congress. In support of this view of the question, we have but to invite the attention of this court to the bill that was introduced at the last Congress, and pressed for passage, amending the present bankruptcy law to the extent of exempting alimony from the list of provable debts. The fate of that bill is well known, for after a full discussion of the same the Judiciary

Committee of the United States Senate refused to report it, thus tacitly admitting that it was in their estimation a provable debt; and, while it is perfectly natural for sympathetic attorneys to shed tears without number and raise the roofs of court-houses, asking sympathy for some wronged and injured client, this court decides cases on the naked law as they find it and not on the desires of what attorneys see fit to try and proclaim what the law should be.

An examination of page 4 of the Record filed in this case will exhibit to this honorable court what the views held on this subject by the trial judge in the court below were. We assumed his views to be his honest ones, and therefore proceeded to effect a compromise with the party named in this case in the matter of her claims for alimony. On the 7th day of July, 1900, a written contract was duly entered into, and by its terms we agreed to pay her the sum of $25 per month alimony accruing after the aforesaid date and $10 per month on the alimony in arrears. This compromise has been fully complied with by the defendant in this case from the time of its having been entered upon up to the present date. Rather more than a year ago the plaintiff herein procured us to be arrested and brought before a court-martial for trial for having failed to pay her her alimony, the charge being that of "conduct unbecoming an officer and gentleman." After an extended trial before an unusually strict court, composed of officers of high rank and distinction, we were fully and honorably acquitted, and yet our only plea brought before that military court was our discharge in bankruptcy. Major General Merritt was but the reviewing authority in this case, and his opinion in no way affected the findings of the court, and for the time he seemed to overlook the fact that the same Congress that passed the bankruptcy law granted him his commission and recognized his right to draw his pay. We are, however, content to continue the fulfillment of the terms of the compromise

we have made under the trial judge's finding in the matter of this alimony.

We nevertheless trust that this honorable court will give us a fair and honest interpretation of the act of Congress touching the bankruptcy law, and we simply desire to state that our acts throughout the history of this entire cause have been governed by the firm and honest belief that we have held that alimony is a provable debt. We believe the cases we have cited of trials wherein this point has been distinctly involved before United States courts support this view. These courts have further contended that the debt of alimony is no more a sacred debt than any similar obligation demanding honorable liquidation. We claim that our discharge in bankruptcy should protect us from further annoyance on the part of the courts, both of the States and the United States, inasmuch as we made the compromise after we were discharged by the trial court. Moreover, we are faithfully on our part complying with all the terms of that compromise, and the plaintiff is accepting our $35 per month at the time it is due each month, and yet while she thus continues to accept it from month to month she is prosecuting her appeal before this honorable court, praying for a reversal, doubtless with the view of having us submitted to another trial by court-martial, and if dismissed the service will deprive us of the only means of complying with the compromise legally entered into by both parties concerned. Even as this brief goes to press we are sending her the $35 due on the 1st to the 3d of April.

JOHN T. DEWEESE,
Counsel for Appellee.

Supreme Court of the United States.

No. 217.—October Term, 1900.

Florence Audubon and John W. Hulse, Assignee of William H. Smith, Appellants, *vs.* Robert W. Shufeldt. } Appeal from the Supreme Court of the District of Columbia.

[May 20, 1901.]

Mr. Justice Gray delivered the opinion of the Court.

This was an appeal from an order of the Supreme Court of the District of Columbia sitting in bankruptcy, granting a discharge to Robert W. Shufeldt.

Shufeldt had been adjudged a bankrupt April 5, 1899, on his petition alleging that he was indebted to the amount of $4538.33, and had no assets which were not exempt under the Bankrupt Act of 1898. The debts from which he sought release were as follows:

Secured debt to Washington National Banking and Loan Association		$3200 00
Unsecured debts as follows:		
Florence Audubon	$800 00	
William H. Smith	150 00	
Lewis J. Yeager	150 00	
Sundry small debts	238 33	
		1338 33
		4538 33

Shufeldt was, and had been for several years before filing his petition in bankruptcy, a surgeon with the rank of captain in the United States Army, on the retired list, and was in receipt of a salary of $175 a month, his pay as such retired officer.

The debt of $3200 was the debt of himself and his wife, secured on land in Takoma Park, Montgomery County, Maryland, conveyed by him to his wife in March, 1898, without consideration.

The debt of $800 represented arrears of alimony, granted to his former wife, Florence Audubon, on February 25, 1898, by a decree of the circuit court of Montgomery County in the State of Maryland, in a cause of

divorce, directing him to pay alimony to her at the rate of $50 a month, beginning April 1, 1898. No part of that alimony has been paid.

About March 1, 1898, Shufeldt left Montgomery County, and took up his residence in the city of Washington in the District of Columbia. A suit in equity has been instituted and is still pending in the Supreme Court of the District of Columbia, to enforce the aforesaid decree for alimony, and to make him pay the alimony in arrear.

The debt of $150 to William H. Smith was a promissory note given for taking testimony in the divorce suit under a commission from the Maryland court, and was duly assigned to John W. Hulse before the filing of the petition in bankruptcy.

The debt of $150 to Lewis J. Yeager was for professional services rendered in the District of Columbia in the equity suit aforesaid.

The small debts for $238.33 were contracted for supplies furnished to Shufeldt and his family before the filing of the petition in bankruptcy.

After the filing of the petition in bankruptcy, Florence Audubon filed in court her claim for $800, being the arrears of alimony, describing it as "a debt" due by him to her; and voted thereon at the meeting of creditors for the election of a trustee. She afterwards filed a memorandum directing the withdrawal of her claim; but no order of the court to that effect was passed.

It was objected that the claim for alimony was not a provable debt under the Bankrupt Act, and should be excepted from the list of debts for which a discharge in bankruptcy might be granted. The court overruled the objection, and granted the discharge, being of opinion that the arrears of alimony which had accrued against the bankrupt up to the time of the adjudication in bankruptcy constituted a provable debt, in the sense of the Bankrupt Act of 1898; but that the discharge could not affect any instalments accruing since that adjudication. Florence Audubon appealed to this court.

By section 4 of the Bankrupt Act of July 1, 1898, c. 541, "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." 30 Stat. 547. An officer in the army falls within this description; and it may be that he is not bound to include his pay in his schedule. *Flarty* v. *Odlum*, (1790) 3 T. R. 681; *Apthorpe* v. *Apthorpe*, (1887) 12 Prob. Div. 192. Our bankrupt act contains no such provision as the English Bankruptcy Act, 1883, authorizing the court, when the bankrupt is an officer in the army or navy, or employed in the civil service, to order a portion of his pay to be applied for the benefit of his creditors in bankruptcy. *In re Ward*, (1897) 1 Q. B. 266. But the question now before us is not whether his pay can be reached in bankruptcy, but whether he is entitled to a discharge from the arrears of alimony due to his former wife.

The Bankrupt Act of 1898, provides in § 1, that a "discharge" means "the release of a bankrupt from all his debts which are provable in bankruptcy, except such as are excepted by this act;" and includes, in § 63, among the debts which may be proved against his estate, "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing," at the time of the petition in bankruptcy, whether then payable or not, and debts "founded upon a contract, expressed or implied." 30 Stat. 541, 563.

Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require. The decree of a court of one State, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another State, and may therefore be there enforced by suit. *Barber* v. *Barber*, (1858) 21 How. 582; *Lynde* v. *Lynde*, (1901) 181 U. S. 183. But its obligation in that respect does not affect its nature. In other respects, alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife, than by a court of a different jurisdiction.

In the State of Maryland, and in the District of Columbia, alimony is granted by decree of a court of equity. *Wallingford* v. *Wallingford*, (1825) 6 Har. & Johns. 485; *Crane* v. *Maginnis*, (1829) 1 Gill & Johns. 463; *Jamison* v. *Jamison*, (1847) 4 Maryland Ch. 289; *Tolman* v. *Tolman*, (1893) 1 App. D. C. 299; *Tolman* v. *Leonard*, (1895) 6 App. D. C. 224; *Alexander* v. *Alexander*, (1898) 13 App. D. C. 334. And, as the Court of Appeals of the District of Columbia has more than once said: "The allowance of alimony is not in the nature of an absolute debt. It is not unconditional and unchangeable. It may be changed in amount, even when in arrears, upon good cause shown to the court having jurisdiction." 6 App. D. C. 233; 13 App. D. C. 352.

Under the Bankrupt Act of 1867, it was held by the District Court of the United States for the Southern District of New York, in an able opinion by Judge Choate, (which is believed to be the only one on the subject under that act,) that a claim for alimony, whether accrued before or after the commencement of the proceedings in bankruptcy, was not a provable

debt nor barred by a discharge. *In re Lachemayer,* (1878) 18 Nat. Bankr. Reg. 270; *S. C.,* 14 Fed. Cas. 914. Like decisions have been made by Judge Brown in the same court under the present bankrupt act. *In re Shepard,* 97 Fed. Rep. 187; *In re Anderson,* 97 Fed. Rep. 321. And the same result has been reached in a careful opinion by Judge Lowell in the District Court for the District of Massachusetts. *In re Nowell,* 99 Fed. Rep. 931.

In *Menzie* v. *Anderson,* (1879) 65 Indiana, 239, the Supreme Court of Indiana held that a judgment for alimony was not a "debt growing out of or founded upon a contract, express or implied," within the meaning of a statute exempting certain property from execution for such a debt.

In *Noyes* v. *Hubbard,* (1892) 64 Vermont, 302, it was held by the Supreme Court of Vermont that a decree for alimony, not being a judgment for the enforcement of any contract, express or implied, existing between the parties thereto, but for the enforcement of a duty in the performance of which the public as well as the parties were interested, was not barred by a discharge in insolvency.

In *Romaine* v. *Chauncey,* (1892) 129 N. Y. 566, it was held by the Court of Appeals of New York that alimony was an allowance for support and maintenance, having no other purpose, and provided for no other object; that it was awarded, not in payment of a debt, but in performance of the general duty of the husband to support the wife, made specific and measured by the decree of the court; and that a court of equity would not lend its aid to compel the appropriation of alimony to the payment of debts contracted by her before it was granted.

In *Barclay* v. *Barclay,* (1900) 184 Illinois, 375, it was adjudged by the Supreme Court of Illinois that alimony could not be regarded as a debt owing from husband to wife, which might be discharged by an order in bankruptcy, whether the alimony accrued before or after the proceedings in bankruptcy; and the court said: "The liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty. It is not to be enforced by an action at law in the State where the decree is entered, but is to be enforced by such proceedings as the chancellor may determine and adopt for its enforcement. It may be enforced by imprisonment for contempt, without violating the constitutional provision prohibiting imprisonment for debt. The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the the amount to be paid by the husband, where he is in arrears in payments required under the decree. Hence such alimony cannot be regarded as a debt owing from the husband to the wife, and, not being so, cannot be discharged by an order in the bankruptcy court."

In England, it seems to be the law that alimony is neither discharged nor provable in bankruptcy. *Linton* v. *Linton*, (1885) 15 Q. B. D. 239; *Hawkins* v. *Hawkins*, (1894) 1 Q. B. 25; *Watkins* v. *Watkins*, (1896) Prob. 222; *Kerr* v. *Kerr*, (1897) 2 Q. B. 439.

The only cases brought to our notice, which tend to support the decision below, are recent decisions of District Courts, in which the authorities above cited are not referred to. *In re Houston*, 94 Fed. Rep. 119; *In re Van Orden*, 96 Fed. Rep. 86; *In re Challoner*, 98 Fed. Rep. 82.

The result is that neither the alimony in arrear at the time of the adjudication in bankruptcy, nor alimony accruing since that adjudication, was provable in bankruptcy, or barred by the discharge.

The order granting a discharge covering arrears of alimony is reversed, and the case remanded for further proceedings consistent with the opinion of this court.

True copy.

Test:

Clerk Supreme Court, U. S.